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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 321.

THE CREEK NATION, *Petitioner*,

v.

THE UNITED STATES.

No. 322.

THE SEMINOLE NATION, *Petitioner*,

v.

THE UNITED STATES.

REPLY BRIEF OF PETITIONERS.

On Writs of Certiorari to the Court of Claims.

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REPLY BRIEF OF PETITIONERS.

We will answer briefly the contentions of respondent.

RESPONDENT'S CONTENTION I.

The respondent contends that because the Indian tribes *agreed to sell* lands to the railroads by the Treaties of 1866, they cannot now claim that the railroads are trespassers,

even though the railroads were intruding on lands of petitioners and never used them for railroad purposes (Resp. Br. p. 9).

The two treaty railroads purchased no lands of petitioners under the Treaties of 1866. They merely took lands and paid nothing to the Indian tribes for them. The Treaties of 1866 and the Acts of Congress authorizing these railroads to construct railroads through the lands of petitioners intended that the railroads take only such lands of petitioners as were *necessary* for railroad purposes. With respect to lands taken and never used for necessary railroad purposes, the railroads were trespassers. These trespasses were permitted by the United States, the guardian, and hence the consequent liability of the United States for the violation of the Treaties of 1866

The respondent further contends that a violation of the guarantee of quiet possession would not make the United States liable for the trespasses of the railroads, and respondent cites the Nez Perce case, 95 C. Cls. 1, in support of this contention (Resp. Br. p. 9).

We submit that here respondent overlooks the fact that this guarantee of quiet possession *by the United States* is contained in the Treaties of 1866; that these treaties were between petitioners and the United States; that the treaties required the respondent to supervise the action of the railroads; and that the United States alone would be liable for a violation of this treaty guarantee. These were contractual obligations of the United States owing directly to petitioners under the Treaties of 1866.

The Nez Perce case, 95 C. Cls. 1, relied on by respondent, clearly has no application to the situation before us for in that case the trespasses were not supervised by the Government. As the court therein said:

> "There is no allegation that white people went upon plaintiff's lands at the direction of the defendant or even at its instigation. Liability is predicated solely on the defendant's failure to keep them out."

In the cases at bar the petitions allege that the intrusions of the railroads were *supervised and permitted by the United States* in violation of the Treaties of 1866 (Creek Case R. 3-4; Seminole case R. 2-3).

Furthermore, there was no guarantee of quiet possession in the Nez Perce treaty, as is contained in the Creek and Seminole treaties of 1866.

RESPONDENT'S CONTENTION II.

Respondent further contends that while Congress in the Act of February 28, 1902, provided that the railroads should compensate the Indians for lands taken and pay through the Secretary of the Interior, an annual charge per mile of railroad constructed, yet United States did not bind itself to assume the obligations of the railroads. *United States* v. *Algoma Lumber Company*, 305 U. S. 415, 421, is cited in support of this contention (Resp. Br. p. 2).

By the passage of the Act respondent did not assume the obligation of the railroads, and it was presumed that the railroads would comply with the provisions of the Act. However, by acting with respect to the lands of petitioners respondent did assume an obligation to its Indian wards. Given a *violation* of the Act of 1902 by the railroads, and a failure of the United States, the guardian, to act to protect the interests of its Indian wards against the railroads, then clearly the guardian is liable to its wards for the resulting loss to the trust estates.

In Bogert, Trusts and Trustees, Vol. 3, Sec. 592, pp. 1867-1868, it is stated:

> "As a portion of the process of assuming control of the trust property, the trustee has the duty of collecting choses in action which are a part of the trust estate. If he finds among the assets of the trust notes, bonds, mortgages, checks, drafts, judgments, or other contract or tort claims, he should proceed with reasonable diligence to collect as much money as possible from the obligors. For a failure to act toward this end with reasonable skill and celerity, the trustee will be liable. * * *" (Cases cited.)

And again in Section 594, pp. 1878-1879, it is stated:

> "The powers of the trustee naturally include the authority to maintain such suits and actions as are necessary to the execution of the trust and incident to the powers expressly or impliedly granted. Thus, where the circumstances of the trust warranted, a trustee has been allowed to bring ejectment, trespass to try title, an action to quiet title, or remove a cloud from it, a suit to exercise an option to buy land, a suit for an injunction against the execution of a lease or to restrain the foreclosure of a mortgage executed by himself, a suit to foreclose, an action to collect rents or rents and profits, a suit to follow trust property, to hold a predecessor liable in damages, conversion, damages for injury to trust property, to collect debts due himself as trustee, detinue, and replevin."

At the time the Act of February 28, 1902 was passed the United States had full administrative control over the property and affairs of these tribes. (*Cherokee Nation* v. *Hitchcock*, 187 U. S. 294.) Under the Curtis Act, approved June 28, 1898, c. 517, 30 Stat. 495, the United States began the division of the tribal estates among the members of the Five Civilized Tribes; and under subsequent agreements made with them, this work was continued by the Government. (See Original Creek Agreement, approved March 1, 1901, c. 676, 31 Stat. 861; Supplemental Creek Agreement, approved June 30, 1902, c. 1323, 32 Stat. 500; Original Seminole Agreement, approved July 1, 1898, c. 542, 30 Stat. 567; Supplemental Seminole Agreement, approved June 2, 1900, c. 610, 31 Stat. 250.)

Having full administrative control over all of the property and affairs of these tribes, certainly the United States was in duty bound to enforce the rights of these tribes as against the railroad companies under the Act of 1902. To hold that the guardian was not required to do so with respect to the railroads, when the United States had full control over all of the property and affairs of these tribes, would seem most unreasonable. If Congress had meant to

emancipate the Indian tribes in this respect, we believe that it would have clearly so stated (*Chippewa Indians* v. *United States*, 307 U. S. 1, 4-5).

The *Algoma Lumber Company* case, 305 U. S. 415, 421, clearly has no application to the situation before us. There a third party endeavored to hold the United States for overpayments under a contract made by the United States as agent for the Klamath Indian tribe. The United States was not a party to the contract, and this Court held that under the *general* jurisdiction of the Court of Claims the United States had not consented to be sued on contracts made as an agent of the tribe, and as to which the United States was not a contracting party. In this case no guardian and ward relationship existed between the parties, and there was no special jurisdictional act authorizing the suit against the United States.

The cases at bar are proceedings under special jurisdictional acts, permitting the wards to adjudicate any and all legal and equitable claims they may have against the United States, arising out of treaties and Acts of Congress in relation to Indian affairs. The Act of August 16, 1937, c. 651, 50 Stat. 650, expressly permitted the adjudication of legal and equitable claims presented by amended petitions filed before or after the passage of the act. The amended petitions here involved were on file in the Court of Claims when the Act of 1937 was passed, and clearly the court had jurisdiction to settle the claims therein presented.

RESPONDENT'S CONTENTION III.

The respondent contends that Section 11 of the Act of April 26, 1906 was merely an intragovernmental direction to the officers of the United States, and was not intended to make the Government liable when its officers failed to discharge their duties under it (Resp. Br. p. 10).

The Act of April 26, 1906, c. 1876, 34 Stat. 137, was a comprehensive statute prescribing rules for the completion of the disposition of the affairs of the Five Civilized Tribes,

begun under the Curtis Act and the agreements made with these tribes. Congress certainly intended that the officers of the United States comply with the act, and that said officers perform the duties required of them under the act with respect to the property of its Indian wards. Otherwise, the act would mean nothing. The petitioners claim the benefits prescribed by this act, and the jurisdictional acts expressly authorize them to sue for legal and equitable claims arising under and growing out of Acts of Congress in relation to Indian Affairs.

The *Sac and Fox* case, 220 U. S. 481, referred to by respondent, has no application to the question now before us for in that case this Court held that the officers of the United States had implicitly followed the directions contained in treaties and acts of Congress governing the disbursement of annuities due the Sac and Fox tribe; that a band of Indians, which had severed its connection with the tribe, could not sue for a part of the annuities due the tribe, for said annuities belonged to the tribe, and not to such a band. In other words, the tribe only could sue to enforce the treaties and Acts of Congress directing the manner in which the *tribal* annuities should be paid to the *tribe*.

The case of *Robertson* v. *Sichel*, 127 U. S. 507, 515, merely states the general law that the United States is not liable to third parties for the torts of its officers. There was no guardian and ward relationship in this case, and no jurisdictional acts such as those authorizing the cases at bar.

RESPONDENT'S CONTENTION IV.

Respondent contends that Section 18 of the Act of April 26, 1906, is merely permissive and not mandatory in effect (Resp. Br. p. 10). We have heretofore pointed out the well established principle that where the interests of third parties are involved such an act is mandatory in effect (Pet. Br. p. 30).

The respondent cites *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 295, in support of its assertion that petitioners

were not precluded by their wardship status from bringing suit on their own behalf. In that case the individuals of the tribe were also included as parties plaintiff, and the question of the right of the Cherokee Nation to bring suit was not raised (see Cohen's Handbook of Federal Indian Law, p. 284).

We have pointed out (Pet. Br. p. 23) that in the *Creek* case, 295 U. S. 103, 110, this Court has stated that the Creek Nation was not in a position where it could be expected to assume the burden of filing suit on its own behalf, but was entitled to rely upon the United States, its guardian, for needed protection of its interests.

In *United States* v. *United States Fidelity & Guaranty Co.*, 106 F. (2d) 804, 807, the Court said:

> "* * * It may not be amiss to recall at the outset certain well established principles. The United States as guardian of Indian tribes or individual Indians may institute appropriate suits or proceedings for the enforcement of the rights or the protection of the property of its Indian wards. Heckman v. United States, 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820; United States v. Noble, 237 U. S. 74, 35 S. Ct. 532, 59 L. Ed. 844; United States v. Board of Com'rs Osage County, 251 U. S. 128, 40 S. Ct. 100, 64 L. Ed. 184; La Motte v. United States, 254 U. S. 570, 41 S. Ct. 204, 65 L. Ed. 410; Cramer v. United States, 261 U. S. 219, 43 S. Ct. 342, 67 L. Ed. 622; United States v. Minnesota, 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539; Mars v. McDougal, 10 Cir., 40 F. 2d 247; Tiger v. Twin State Oil Co., 10 Cir., 48 F. 2d 509. The right to maintain suits or proceedings of that character is the necessary complement to its obligations of guardianship. And in such a suit or proceeding it is a real party even though it does not have any pecuniary interest in the final recovery. Heckman v. United States, supra; United States v. New Orleans Pac. R. Co., 248 U. S. 507, 39 S. Ct. 175, 63 L. Ed. 388; * * *"

This case was reversed by this Court on other grounds in 309 U. S. 506.

RESPONDENT'S CONTENTION V.

The respondent contends that the petitioners are asking the Court to go beyond the language of the special jurisdictional acts to uphold the claims presented in the amended petitions before us (Resp. Br. p. 11). We submit that this contention is in error. A cursory glance at the petitions will show that they present legal and equitable claims arising and growing out of treaties and statutes.

We are asking the Court to enforce the protection and benefits prescribed by treaty and statutes for these Indian wards of our Government. Clearly such claims arise and grow out of treaties and statutes. In fact, the very relationship of guardian and ward, existing between the United States and these Indian tribes, grows out of treaties and statutes, and the dealings of the United States with these dependent Indian tribes, as was stated by this Court in the *Kagama* case (Pet. Br. p. 27).

We have referred to the Act of May 28, 1830, (Pet. Br. p. 33), under which the President is given general superintendence and care over these tribes, and is directed to protect them.

The first treaty between the United States and these Indian tribes, the Treaty of August 7, 1790, 7 Stat. 35, Article II, provides in part that:

> "The undersigned Kings, Chiefs and Warriors, for themselves and all parts of the Creek Nation [The Semiholes were then a constituent part of the Creek Nation] within the limits of the United States, do acknowledge themselves, and the said parts of the Creek nation, to be under the protection of the United States of America, and of no other sovereign whosoever; * * *"

Thus the guardian relationship between the United States and the Indian nations has arisen by virtue of treaty and statutes. Given a violation of a treaty and act of Congress, and a duty of the United States arising thereunder, either express or implied, the jurisdictional acts do not preclude the application of legal and equitable principles to the situation, for said acts expressly permit the adjudication of *legal and equitable claims*.

In *Seminole Nation* v. *United States*, 316 U. S. 286, wherein this Court, under these same jurisdictional acts, upheld claims of a similar nature to those involved in the present controversy, this Court said (pp. 297-298):

> "Having formulated the proper rule of law, we must examine the facts of this case. Although the Court of Claims had jurisdiction of this issue, for such an action for breach of fiduciary duty growing out of treaty obligations is clearly an equitable claim within the meaning of the jurisdictional act, 43 Stat. 133, the court did not consider, and hence made no findings on this issue."

In Words and Phrases, Vol. 4 (Perm. Ed.), pp. 207, 212, it is stated:

> "A case 'arising under Act of Congress' is a controversy which turns on the existence, effect, or operation of an act of Congress, and hence a suit brought to determine the same is a case arising under such act within the statute. Hughes v. Northern Pac. R. Co., 18 F. 106, 110.
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> "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute right or privilege, or claim, or protection or defense of the party by whom they are asserted. New Orleans, M. & T. R. Co. v. State of Mississippi, 102 U. S. 135, 141, 26 L. Ed. 96."

We submit that for the failure of the United States to enforce, by suit or otherwise, the provisions of treaties and statutes prescribing protection and benefits for its Indian wards, the respondent is liable for losses thus occasioned to the trust estates, under the special jurisdictional acts in the cases at bar.

Respectfully submitted,

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